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Supreme Court of the United States

OCTOBER TERM, 1929.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1929.

RUFFIN COLLIE, CLINTON COOK AND ROBBIE ROWE, PETITIONERS,

versus

THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The petition of Ruffin Collie, Clinton Cook and Robbie Rowe respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE MATTERS INVOLVED.

(1) The denial of the right of unpaid seamen to priority in the proceeds of the sale of their vessel, and/or a judgment *in personam* against her defaulting master and owner, for the statutory double wages provided by U. S. Code title 46, Section 596, incurred by reason of

the refusal and neglect to pay said seamen the wages claimed in their libels and found to be due. (Assignments of Error Nos. 1, 2, 3, R., 65-66.)

(2) The denial of the right of Petitioners Collie and Cook:

> "to damages for the breach of their respective contracts of hire, including, in the case of Ruffin Collie, return transportation and subsistence to Washington, North Carolina, the port of his shipment!" (Assignment of Error No. 4, R., 66.)

(3) The propriety of the action of the District Court in suspending the operation of the Decree of Distribution, entered on September 4, 1928, after appellants asked for an order directing the payment forthwith, (R., 64), of the wages adjudged to be due them and the costs:

> "without prejudice to any of the rights of the said seamen petitioners, in the premises, and especially as to their right to prosecute their said appeal!" (Assignments Nos. 5, 6, 7, R., 66-67.)

(4) Whether or not it was proper for the Court of Appeals, after finding that without sufficient cause:

> " * * * the amounts ($402.57, $388.00 and $151.50, respectively) *found* to be due appellants were withheld from them pending this appeal at the instance of appellees,"

to hold on May 2, 1929 (R., 74-76) that petitioners were merely entitled to:

> " * * * interest for the time during which the amounts due them have been thus withheld, and that the costs on appeal be divided, [the costs thus assessed against them being $94.21, more than two and one-half times the interest then accrued],

instead of awarding the double wages provided by U. S. Code title 46, Section 596, together with their *full* appellate costs of $189.07.

B. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Because the Circuit Court of Appeals for the Fourth Circuit has:

(1) Rendered a judgment that is in real and embarrassing conflict with its own previous decisions, the opinions of this Court, the judgment of the British House of Lords, and the decisions of the Circuit Courts of Appeals for the First, Fifth and Ninth Circuits, as well as the courts of last resort in New York and Massachusetts, so that a review by this Court is necessary for uniformity of decision in the federal and state courts in respect to a highly remedial federal statute, intended, as stated by Mr. Justice Sutherland in *O'Hara* v. *Luckenbach*, 269 U. S. 364, 367: "to safeguard the seamen's welfare as workmen."

(2) Decided an important question of general law in a way that is untenable and in conflict with the weight of authority.

(3) Decided an important question of federal law of very extensive and every-day occurrence, which has not been, but should be, settled by this Court.

(4) Decided a federal question in a way that conflicts with the applicable decisions of this Court, the judicial history of U. S. C. title 46, Sections 594, 596, and the cognate sections of the Seamen's Acts of June 7, 1872-March 4, 1915.

(5) So far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court for the Eastern District of Virginia, as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Fourth Circuit should be granted.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.

Supreme Court of the United States

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THOMAS D. FERGUSSON; F. W. DARLING AND J. S. DARLING, TRADING AS J. S. DARLING & SON; S. M. SINCLAIR; W. J. WILLIAMSON; J. C. COUNCIL; NYE, THE ENGINE MAN, INCORPORATED; E. T. LAWSON AND I. E. LAWSON, TRADING AS E. T. LAWSON & SON; L. JOHNSON AND H. L. CORKRAN, TRADING AS JOHNSON & CORKRAN, AND J. V. BICKFORD, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION.

I. THE DECISIONS OF THE COURTS BELOW.

The *per curiam* decision of the Circuit Court of Appeals for the Fourth Circuit, was rendered on May 2, 1929, and is reported in 31 F. (2d) 1010. On said date the Court's decree was also entered and petitioners in

due time thereafter applied for a rehearing (R., 76), which was denied on July 1, 1929, without opinion (R., 79).

The appellate court's *per curiam* decision and its decrees thereon are to be found on pages 75, *et seq.*, of the transcript of record, and the decree of the District Court, entered on September 4, 1928, appears at page 58, *et seq.* No opinion was filed by the trial court, which like the Court of Appeals, expressly refrained from giving any reason or citing any authority for its conclusions.

II. JURISDICTION.

(1) The date of the decree to be reviewed is July 1, 1929, and will be found upon page 79 of the record.

Grounds of This Court's Jurisdiction.

(2) This case involves important questions, (R., 65-67, 76-78), of maritime law, affecting seamen and shipping interests generally, which frequently arise before both federal and state tribunals, but have not heretofore been definitely decided by this Court, and which, for the information of the bench and bar of this country, should be determined, pursuant to U. S. C. title 28, Section 347 (a).

(3) Construction of the U. S. C. title 46, Section 596, (R. S. 4529), in the light of the judicial history of said section and the cognate provisions of the Seamen's Acts of June 7, 1872, and March 4, 1915.

III. STATEMENT OF THE CASE.

A. The Facts.

The "DOLA LAWSON" is a licensed vessel, duly entered in the United States Custom House as engaged in the Coastwise Trade. She was equipped for fish-trawling on the Atlantic Ocean and traded between Hampton, Virginia, and other Virginia, Maryland and North Carolina ports, (R., 36, 38), delivering her catches of fish and taking on ice, food, fuel and other supplies.

Rowe was hired in Hampton, Virginia, and worked on the vessel for six (6) weeks, beginning with September 1, 1927, at wages of $25.00 per week, (R., 17, 36-44). On January 1, 1928, sometime after Rowe left the vessel, Cook was employed, at $80.00 per month (R., 3-6, 22-28, 34-35), in Hampton, Virginia, and thereafter Collie was engaged at Washington, North Carolina, on January 15, 1928, at $100.00 per month, while the "DOLA LAWSON" was lying at that port. Both Collie and Cook remained on the vessel from the time they were hired up to May 14, 1928, when she was attached by the Marshal of the Eastern District of Virginia on a libel filed on that day by J. S. Darling and Son, but, with the exception of $5.00 paid Rowe and $25.00 paid to Collie, by the owner, Thomas D. Fergusson, nothing was paid these seamen on account of their claims. See Respondent Fergusson's admissions with regard to this (R., 37-38).

B. The Proceedings in the Trial Court.

Darling & Son, who were later awarded but $7.97 out of the proceeds of sale (R., 63), filed their libel against the "DOLA LAWSON" and Thomas D. Fergusson, her owner, on May 14, 1928. On May 16, 1928, immediately after the vessel was seized and they were forced to leave her, Petitioners Collie and Cook filed their intervening

petition, setting up (R., 3-6) the seizure by the Marshal; the fact that lien claims were piling up; that said seamen had claims for wages and breach of contract, in addition to "waiting time" that (R., 5) was:

> "increasing at the aggregate rate of Twelve Dollars ($12.00) per day and that if their claims are not paid until a distribution is had in the ordinary course, in view of the broken down condition of the said power boat and the present low value of vessels of this character, there will not be a sufficient sum realized from its sale to cover the amounts which will be lawfully due unto your said petitioners."

Accordingly, (R., 6) petitioners prayed among other things:

> "That the said vessel be forthwith condemned and sold to pay the amount of petitioners' claims."

Contemporaneously with the filing of their petition, a letter (Libellants' Exhibit No. 1; R., 46), was addressed to the District Judge, through his Clerk, as well as to all counsel who had appeared in the case up to that time, apprising them of the nature of petitioners' claims and stressing the fact that it was desired to have the boat sold forthwith:

> "and the proceeds distributed without any undue delay, in line with the prayer of the petition",

then being filed on behalf of Collie and Cook.

No answer or pleading of any kind was ever filed by any of the parties to said petition of Collie and Cook. Not until June 2, 1928, did the libellants submit the order of sale that was entered on that day (R., 20). This order recited the proceedings up to that time and set forth:

"that no appearance has been entered and no answer or other defense interposed, and that it will be to the best inferest of all parties concerned that the said Power Boat "DOLA LAWSON", now in the custody of the Marshal of this Court, be sold in order to obviate further expense."

On June 9, 1928, Cook and several of the repair and supply lien claimants appeared in open court and proved their claims, the Court deciding from the bench that Cook was entitled to recover from the "DOLA LAWSON" and/or Respondent Fergusson, her owner, the full amount of his wages (R., 34-35; 58-59), but no damages or "waiting time" were allowed him. Collie's claim was also submitted as having been proven by Cook (R., 23-24; 34-35), but, the Court feeling that Collie himself should be produced, the matter was laid over until June 12, 1928, when this seaman testified, as did Respondent Fergusson, who has never interposed any defense and who up to that time had not appeared in court. The Court again ruled from the bench and held that Collie was likewise entitled to the full amount of his wages, but, in line with its action with regard to Cook's claims of similar character, also refused to award this seaman any damages for breach of contract or "waiting time" (R., 62), either against the vessel *in rem* or her owner *in personam*.

In the meantime guard hire amounting to $92.50 had accumulated in favor of Darling and Son, the vessel, which brought but $1,650.00, not being put up and sold at auction until June 18, 1929 (R., 21, 63). Petitioner Rowe then became aware that this suit was pending, and on June 23, 1928, his petition was filed and all counsel were again and repeatedly thereafter advised (Libellants' Exhibits Nos. 2, 3, 4, 5, 6; R., 47-51), of petitioners' desire that:

"a decree distributing the fund might be entered at the earliest possible moment".

From July 16, 1928, to August 2, 1928, efforts were made by petitioners' proctor to get the proctors who were taking the lead in opposing the wage claims to agree on a date to take the depositions of Rowe and his witness. Finally, on the latter date, notices of the taking of these depositions were served on all opposing counsel by mail and their co-operation in getting the money in the Registry distributed was again requested. (Libellants' Exhibit No. 5, R., 50.) The depositions were completed on August 17, 1928, and on that day submitted to the District Judge, along with the draft of the decree that had been previously prepared, but which the repair and supply lien claimant objected to (R., 51).

On September 4, 1928, the form of decree theretofore submitted on behalf of appellants was signed by the District Judge, but only after he had interlineated the language on the last page thereof. These interlineations are physically indicated on the original of the final decree, which the trial court ordered transmitted to the Court of Appeals (R., 69), and are also shown in the transcript as printed. (R., 63-64.) The trial judge's action in suspending the operation of the decree:

> "until the expiration of the time allowed by law and rules of this Court for the perfection of such an appeal,"

was vigorously opposed by petitioners and as vigorously advocated by opposing counsel. Petitioners' draft called for the payment *forthwith* of the earned wages decreed them, as well as the costs, without prejudice to their right to prosecute their appeal. The District Court below struck out these provisions, and, in lieu thereof, inserted the above quoted suspending proviso, adopting the view expressed in the concluding paragraph of the draft presented on behalf of respondents (R., 57, 64).

C. The Proceedings on the Appeal.

Petitioner's application for appeal and assignment of errors was filed on November 30, 1928, (R., 65).

Due to the failure of the respondent owner to enter an appearance and the lack of interest manifested by the supply and repair lien claimants after it became apparent that they could not defeat the wage claims proved by the petitioning seamen, it became necessary to have the trial judge enter an order directing what the record should contain. This could not be accomplished until January 2, 1929, but the transcript was certified on January 5, 1929 (R., 71).

The case was promptly docketed on January 8, 1929, (R., 72), without prepayment of costs, by virtue of the provisions of U. S. C. title 28, Section 837, (Seamen's Act of July 1, 1918), under which petitioners now bring their application to this Court. The Court of Appeals was immediately asked by petitioners (R., 73) to place the cause at the foot of its January, 1929, Docket, but, due to the pressure of other business, was unable to do so. However, none of the respondents entered any appearance therein until April 4, 1929, those who finally appeared submitting a brief on April 22, 1929, and even now the respondent owner and three of the supply lien claimants are still in default (R., 73). A hearing was thereafter had in the appellate court on April 22, 1929, resulting in the *per curiam* decision of May 2, 1929, and the subsequent decree of July 1, 1929, denying the seamen's petition for a rehearing (R., 79).

IV. SPECIFICATION OF ERRORS.

The errors assigned and intended to be urged have been outlined above in the petition (pp. 1-4), to which reference is respectfully made.

V. ARGUMENT.

Point 1.—Petitioners' Wages Were Withheld "Without Sufficient Cause".

Respondent Fergusson testified that:

> "The claims asserted by Ruffin Collie and Clinton Cook in their intervening libel (R., 37), are correct,"

and both courts below found the essential facts in favor of all three petitioning seamen. The trial court, on *June 8, 1928*, established that Petitioner Cook (R., 34-35, 59) was:

> "entitled to recover of and from the Power Boat 'DOLA LAWSON' and/or Thomas D. Fergusson, her owner, the full amount of his wages, as claimed in his libel and petition * * * , together with interest on his said wages, as the same became due and payable and has a prior lien against the above proceeds of sale for said sum and interest,"

and likewise found in favor of Collie and Rowe (R., 58, 59), on *June 12, 1928*, and *September 4, 1928*, respectively.

The Circuit Court of Appeals for the Fourth Circuit, in overruling the District Court's suspension of the operation of its Decree of Distribution (R., 74), declared that, as:

> "the amounts found to be due appellants [petitioning seamen] were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from the order allowing same, we think it but right that appellants be allowed interest for the time during which the amounts due them have been thus withheld, and that the costs on appeal be divided."

On the basis of these conclusions it is perfectly clear that the wages of these seamen were withheld "without

sufficient cause" as defined in U. S. C. title 46, Section 596. This being true there became vested in them the right to collect from their vessel and/or her owner the statutory double wages provided in unmistakable terms, under the above remedial Act:

> "for *each* and *every* day during which payment is delayed * * * which sum *shall* be recoverable *as wages* in *any* claim made before the court;"

Surely, Respondent Fergusson, the owner, cannot escape the clear words of the statute, and, as shown by the great weight of authority the vessel is also liable *in rem* for "waiting time" thereunder.

POINT 2.—THE COURTS BELOW DISREGARDED THE JUDICIAL HISTORY OF U. S. C. TITLE 46, SECS. 594-596.

The decision of the Court of Appeals overlooks and disregards entirely the historical background of U. S. C. title 46, Sections 594, 596, and the reasons which brought about their enactment. This is illustrated by the resolute purpose twice manifested by Congress in successively increasing the measure of recovery, which was originally limited to ten days single pay by the Judiciary Act of July 20, 1790, 1 Stat. 133, for, except to increase the amount of extra wages recoverable, no substantial change has ever been made in the context of the parent Act. The Seamen's Act of March 4, 1915, Section 3, which doubled the unlimited "waiting time" previously provided by the Dingley Act of December 21, 1898, 30 Stat. 756, is, therefore, the final expression of the clear will of Congress, being enacted within a year after the decision of the Circuit Court of Appeals for the Ninth Circuit in *Pacific Mail S. S. Co.* v. *Schmidt,* (1914) 214 Fed. 513.

When that case got to this Court, in an opinion reported in 241 U. S. 245, the District Court's decision awarding extra pay up to the date of its decree was affirmed, though the statutory wages added thereto by the

Court of Appeals was disallowed, because it was held that the petitioning shipowner had ample justification for the appeal. As here the Court below specifically found (R., 74), that the earned wages confessedly due these seamen:

> "were withheld from them pending this appeal at the instance of appellees, although appellees did not appeal from the order allowing same,"

there can be no doubt that the situation now presented to this Court is much more flagrant than was passed on adversely to the shipowner in *Pacific Mail S. S. Co.* v. *Schmidt.*

Robertson v. *Baldwin,* 165 U. S. 275, 287, 299.
Tucker v. *Alexandroff,* 183 U. S. 424, 444.
The Eudora, 190 U. S. 169, 175.
Wilder v. *Inter-Island Co.,* 211 U. S. 239, 246, 248.
Inter-Island Co. v. *Byrne,* 239 U. S. 459, 462.
Sandberg v. *McDonald,* 248 U. S. 185, 202.
Strathearn v. *Dillon,* 252 U. S. 348.
Pacific Mail S. S. Co. v. *Lucas,* 258 U. S. 266.
O'Hara v. *Luckenbach,* 269 U. S. 364, 367.

POINT 3.—U. S. C. TITLE 46, SECS. 594-596 PROVIDE FOR MARITIME LIENS, AS WELL AS IN PERSONAM RECOVERIES.

In construing U. S. C. title 46, Section 594, a cognate section of the Act of June 7, 1872, which does not differ in essentials from U. S. C. title 46, Section 596, this Court in *The Steel Trader,* 275 U. S. 388 (1928), made it plain that seamen are entitled to a lien for the extra wages incorporated in their contracts by U. S. C. title 46, Sections 594, 596. Speaking through Mr. Justice McReynolds, this Court said:

> "The provision that such sum may be recovered 'as if it were *wages duly earned*' permits the seamen to enforce payment by the *special* and *sum-*

mary methods provided for collecting his ordinary wages.

"In *Calvin* v. *Huntley*, (1901) 178 Mass. 29, 32, 59 N. E. 435 [in which Mr. Justice Holmes, then Chief Justice of that Court, concurred] we think the Supreme Court of Massachusetts properly interpreted Section 4527 [U. S. C. title 46, Section 594], and in respect to it rightly said:

"'It speaks not of punishment, but of compensation; its object is to protect the seaman from loss rather than to punish the master for discharging him.

"' * * * in all fairness he should recover more than the amount due him for wages earned. Hence it might be deemed advisable to have this indefinite element made definite by a general law with reference to which the parties may conclusively be presumed to have contracted, and which therefore should be taken to be the law of the contract. The object of the statute is not to punish but to provide a reasonable rule of compensation for a breach of contract. We think the statute not penal but remedial. * * * [Italics and language in brackets added.]

In *Cox* v. *Lykes* (1924), 237 N. Y. 376, 143 N. E. 226, it was also held that the extra wages were recoverable as contractual compensation, following and approving the rule in *Calvin* v. *Huntley*, *supra*. The Court pointed to the fact that, long before the decision in *Pacific Mail S. S. Co.* v. *Schmidt*, *supra*, Mr. Justice Holmes, who wrote this Court's opinion therein, also concurred in the above unanimous decision of the Supreme Judicial Court of Massachusetts, while Chief Justice of that Court.

Chief Judge Cardozo, in delivering the unanimous opinion of the New York Court of Appeals, interpreting U. S. title 46, Section 596, and incidentally construing Section 597, said, at pages 379-380:

"Congress has expressly said that the extra compensation, when due, 'shall be recoverable as wages'. * * *

"How much this extra amount should be would be often a troublesome question if it were left open in every case. * * *

"The case cited from Massachusetts is authority for the ruling that an action for extra wages under Section 4527, Rev. Stat., (U. S. C. title 46, Section 594), which does not differ in essentials from Section 4529 (U. S. C. title 46, Section 596), may be maintained in the state courts, and is not an action for a penalty. * * *

"Here Congress, imposing a liability for the benefit of seamen, has put it on the same plane as a liability for wages, and has said that the two shall be enforceable together. * * *

"The amendment (to U. S. C. title 46, Section 597) means that if unfair advantage is taken of their necessities or ignorance, they are no longer to be concluded by releases which throw their rights away. The courts under the present act may relieve from oppression, though it fall short of fraud or duress in the rigor of its constraint, if thereby justice will be done.

"We think the inference permissible that for oppression or unfair advantage the annulment of this release would be in furtherance of justice. The trier of the facts so held, and, unless there is no basis in the record for the exercise of discretion, we are not at liberty in this court to say that he was wrong. The plaintiff was told that no money would be paid without the signing of the paper. He had been kept waiting many weeks; all his money was spent; he was at the end of his resources. He signed what was put before him because he was unable to wait longer. A different question would be here if his right to wages were shown to have been the subject of reasonable controversy. So far as the record shows, payment was withheld without color of excuse. Upon such a showing, wages earned during delay were as plainly due as wages earned during the voyage. Release of the whole, when the right is

uncontested, is not a fair condition of payment of a part."

Situations parallel to the case at bar were before Judge Cochran in *The Trader*, 17 F. (2d) 623, Judge Soper in *The Fort Gaines*, 18 F. (2d) 413, and Judge Coleman in *The Chester*, 25 F. (2d) 908, all of whom expressly determined that the *extra pay*, provided by U. S. C. title 46, Sections 594 and 596, respectively, is contractual and gives rise to a *prior* maritime lien. The above decisions are based upon *Gerber* v. *Spencer* (C. C. A. 9), 278 F. 886, 889-90, the outstanding appellate opinion on the subject, which is also cited with approval by the New York Court of Appeals in *Cox* v. *Lykes, supra*, the Ninth Circuit Court of Appeals in *Buckley* v. *Oceanic S. S. Co.*, 5 F. (2d) 545, and by the Fourth Circuit Court of Appeals below in *The Whittemore*, 11 F. (2d) 344, and *The Noyes*, 20 F. (2d) 342.

The principles controlling, where the payment of seamen's wages is delayed, were also adverted to by Judge Coleman in *The Lake Galewood*, 21 F. (2d) 987, affirmed by the Court of Appeals in 25 F. (2d) 1020, on the authority of *The Whittemore*, *The Noyes* and *The Thurlow* (C. C. A. 4), 25 F. (2d) 835, all of which decreed the payment of the statutory double wages as maritime liens.

The Br. Brig Wexford (D. C. N. Y.), 3 F. 577.
The Astoria (C. C. A. 5), 281 F. 618, 621.
The Nika, (D. C. Wash.), 287 F. 717.
The Great Canton, (D. C. N. Y.) 299 F. 953.
The Morning Star, (D. C. Wash.) 1 F. (2d) 410.

City of Montgomery, (D. C. N. Y.) 210 F. 673.
Burns v. *Davis*, (C. C. A. 1) 271 F. 439.
Vincent v. *U. S.*, (C. C. A. 9), 272 F. 889.
The El Estro, 14 F. (26) 349—aff: *sub-nom Southern Pac. Co.* v. *Hair*, (C. C. A. 5), 25 F. (2d) 349.

Everett v. *U. S.* (C. C. A. 9), 284 F. 203, 207, *certiorari* denied, 261 U. S. 615.

POINT 4.—THE EXTRA PAY PROVIDED BY U. S. C. TITLE 46, SEC. 596, IS AN INCIDENT TO THE EARNED WAGES.

Circuit Judge Hunt, speaking for the Ninth Circuit of Appeals, in *Gerber* v. *Spencer, supra,* which closely resembles the instant controversy, affirmed a judgment awarding $13,180.88 "waiting time", in addition to allowances for transportation and subsistence, holding that:

> "The purpose of the statute (U. S. C. title 46, Section 596), where there is not sufficient cause for refusal or neglect to pay as required, is to *secure* to the seamen an amount as extra pay by way of *compensation* for delay. The extra pay is an *incident* to the claim of wages proper. We adopt the clear statement by Judge Choate in *Covert* v. *British Brig Wexford,* (D. C.) 3 Fed. 577, 578, 579:"
>
> 'These *protective* statutes would be of little or no value to the seamen, if they do not give them a *lien* on the vessel. A mere right to enforce a personal claim for such small sums against the master or owner would generally be of no value to them; and, if they have a *lien,* it must, I think, be presumed that it was intended to be a *lien* in *all* respects like that for their stipulated wages—one equally beneficial to them.' *The Amazon* (D. C.), 144 Fed. 153.
>
> " * * * The *tender* made by Gerber was not sufficient to cover wages up to and including March 17, 1921, and *in addition* thereto a sum equal to two days' pay for each man every day from March 17 up to and including the date of tender, while for the *delay* in payment *after* April 27 there were no sufficient cause. * * *
>
> "The circumstance that the Pacific Motorship Company was in financial difficulties did not relieve it from an obligation with respect to claim for wages, including extra pay. The *Chas. L. Baylis,* (D. C.) 25 Fed. 862. * * * Cases pertinent to this are

Cubadist (D. C.), 252 Fed. 662; *City of Montgomery*, (D. C.), 210 Fed. 675."

"The general rule that right of other creditors are subordinate to claim for wages is applicable. The rights of seamen have always been *cautiously* guarded by statutes and the courts should make their decrees *in accord* with the spirit and intent of the law to *protect* the seamen."

"* * * When the seamen demanded their wages, the company did not dispute the amounts claimed by the men. It *failed* to take steps to meet demands; so did the receiver after he was appointed, for he denied that the libellants were entitled to wages from the day of shipping to the date of filing the libel. (Italics added.)

In concluding his opinion in *The Wexford, supra,* a decision that is also cited in *Cox* v. *Lykes,* and some of the other prevailing authorities interpreting U. S. C. title 46, Sections 594-596, Judge Choate used the following language, which is peculiarly applicable to the instant case:

"The wages must be deemed by the contract to be *agreed* upon as *this much more* in case of delay in payment. There must therefore be a decree for the seamen for their wages and *extra pay,* with costs, payable *at once,* in *preference* to all other claims." (Italics added.)

In *The Trader* (D. C., So. Car. 1926), *supra,* Judge Cochran directed the payment of wages due the seamen *immediately* after the vessel was sold. Subsequently they were decreed, out of the fund in the registry, passage money back to the port of shipment, as well as their living expenses while out of employment. Construing U. S. C. title 46, Sec. 596, the Court said:

"* * * It is to be observed that the statute expressly says that these so-called penalties shall be *'recoverable as wages'*. They are an incident to and a *part* of the *actual* wages, *just as much as interest*

is an incident to and a part of a debt. They are intended as *compensation* for the delay in the payment, and, inasmuch as they are an *incident* to and a *part* of the wages, they will constitute a maritime *lien* on the vessel, the *same* as wages." (Italics added.)

Compare:

Hicks v. *Guinness,* 269 U. S. 71.
Die Deutsche Bank v. *Humphrey,* 272 U. S. 517-23-25.

In *Hicks* v. *Guinness, supra,* this Court, in passing on a closely analogous matter involving the time during which interest (double wages are *substituted* for interest in the case at bar by U. S. C. title 46, Sec. 596) should run on as a *fixed* liability, unanimously held:

"The obligation of a contract is subject to implied exceptions, *but when a liability is incurred by wrong or default it is absolute. Interest* is due as one of its *incidentals,* and inability to pay it *no more excuses* from that than it does from the principal amount. Of course while the *damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law.*" * * * (Italics added.)

In *The Fort Gaines,* (D. C. Md. 1927), *supra,* Judge Soper said:

"The failure of the owners of a vessel to pay claims against her when seized upon legal process followed by sale of the vessel, and the termination of the employment of the crew consequent upon such proceedings, have been held to constitute a *termination* of the shipping agreement under Section 4529 of the Revised Statutes (U. S. C. 46, Sec. 596). * * * The circumstances that the owner is in financial difficulties does *not* relieve him from the obligation'

with respect to claims for wages, *including* extra pay. * * *

"A similar decision was rendered in the case of *The Great Canton*, 299 Fed. 953, wherein seamen were permitted to recover an extra month's wages under R. S. Section 4527 for an improper dischage, and were allowed a *prior* maritime lien. * * * See also *Covert* vs. *The Wexford*, 3 Fed. 577; *Adolph*, 7 Fed. 501. * * *

"The rights of the officers and crew in this case to *extra pay* therefore give rise to a *lien* upon the ship, and such a *lien* must be held to be *prior* to the claims of other creditors in accordance with the general rule applicable in the courts of the United States." (Italics added.)

Compare:

The Thurlow, supra.

Marsland v. *The Yosemite*, (D. C. N. Y.), 18 F. 331-33.

Caffyn v. *Peabody*, (D. C. Wash.), 149 F. 294.

Judge Coleman, in *The Chester* (D. C. Md. 1928), *supra*, where the corporate owner was in the hands of a receiver and wherein the seamen were likewise discharged by the Marshal seizing their vessel, held:

"As was said in *The Trader*, 17 F. (2d) 623, 626, mere financial straits are not enough:

'It is the duty of the master or owner to take steps to insure the prompt payment of wages, and if financial difficulties were allowed to be a sufficient excuse, it would in many cases practically take away from the seamen their rights under the statute.' See also *Gerber* vs. *Spencer*, 278 Fed. 886." * * *

"It is well established that money payable under Section 4529 of the Revised Statutes, is payable *essentially* as wages and *not* penalties. *Gerber* vs. *Spencer, supra; Buckley* vs. *Oceanic Steamship*

Co., 5 F. (2d) 545. Further, it is axiomatic that seamen have a *lien* upon the vessel for their wages. Thus, it follows that they must also have a *lien* for *any* and *all* sums payable under Section 4529, and not merely a right to enforce a personal claim against the master or owner. *Nika*, 287 Fed. 717; *Great Canton*, 299 Fed. 953; *Covert* vs. *The Wexford*, 3 Fed. 577." (Italics added.)

In *The Thurlow, supra*, it was held:

"A very vital question is presented with respect to whether these libellants are each entitled to the penalty of four dollars per day *after* the rendition of the final decree by the District Court on November 29, 1926, to the date the wages were *actually* paid them, December 7, 1926, *without prejudice*. No appeal was taken by the *respondents* and no sufficient cause is shown for a delay in paying the wages *on the day* they were determined by the Court. Since there was *no appeal by them* and *no cause* for the delay in payment, we are of the opinion that they were entitled to this penalty of four dollars per day each from November 20, 1926, to December 7, 1926, inclusive. * * * ." (Italics added.)

Hepburn v. *Auld*, 1 Cranch 321.
Colby v. *Reed*, 99 U. S. 560.
Peugh v. *Davis*, 113 U. S. 542-545.
Yazo & M. V. Co. v. *Jackson*, 226 U. S. 217.

The principles announced by the House of Lords in *Palace Shipping Co.* v. *Caine*, A. C. 386 (July 29, 1907), mentioned in *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, forcefully demonstrate how the admiralty law will take care that neither the ship's nor the shipowner's *duty* to pay seamen *promptly* is *evaded*. In delivering the opinion, Lord Chancellor Loreburn made the following remarks regarding issues quite similar to those now before this Court:

"* * * And though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded.

"The men *lawfully* left the ship, for they were *compelled* by law *against their will* to leave it. Their engagement was *in fact* ended * * *

"The delay in payment of their wages was *not* due to the *act* or *default* of the seamen, or to any reasonable dispute as to the liability, for the liability for past wages was never disputed. It was due *solely* to the *wrongful* act or *default* of the owner or master. And, therefore, the seamen's wages continued *to run* and be payable *until they received them*, which was not till the judgment of the Court of Appeal * * *." (Italics added.)

In *The Charles Whittemore, supra,* where, as in the case at bar, efforts were made to force seamen to surrender their claims and to prejudice their endeavors to collect "waiting time", the Court said:

"This the respondent *could not do,* as it constituted *neither a payment* of the wages nor a *lawful tender* of the amount due, * * *. The fact that, in the litigation that followed, in this particular case, the court *sustained* respondent's claim to withhold the fines and penalties imposed, would not warrant the *imposition* of any *such condition* or penalty as was sought to be imposed. The *only* effect of libellants accepting the payment of the wages upon the conditions *prescribed* would have been to *surrender* their claims *entirely.* Under the law libellants were entitled to have paid them within *two days* after the termination of the voyage the amount of wages due them, and in default of such payment (U. S. C. title 46, Sec. 596) imposed a penalty of two days' pay for *each* day of delay in payment. If this *important provision* of the statute looking to securing for seamen the *prompt* payment of wages due them could be lightly avoided by the *ship's prescribing conditions* like those in this case, it would work an *easy avoidance* of a *most important provision* of the law enacted for the *protection of seamen.*"

" * * * The mariners of a ship are commonly said to be the wards of the admiralty. Their wages, their rights, their wrongs and injuries have always been a special subject of the admiralty jurisdiction."

" * * * *Benedict's Admiralty* (4th Ed.), Section 182.

"*Gerber, et als.*, v. *Spencer, et als.*, 278 Fed. 886, 889-90 (C. C. A. 9th Circuit) and cases cited.

"The libellants are entitled to recover double wages at the rate of $60.00 per month for *each day* their wages *were withheld.* * * * " (Italics added.)

The Elizabeth Maersk, (D. C. La.), 258 F. 765.
Boulton v. *Moore*, (D. C. Ill.), 14 F. 922.
Benedict's Admiralty (5th Ed.), Sec. 441.
26 *R. C. L.*, 659-660.
Davidge v. *Simmons*, (App. D. C.), 266 F. 1018.

POINT 5.—U. S. C. TITLE 46, SEC. 596, IS REMEDIAL AND SHOULD BE ENFORCED ACCORDING TO ITS PLAIN TERMS.

In the face of the fact, that in *The Noyes*, the Court below again relied on *Gerber* v. *Spencer*, in addition to its previous decisions in *Elman* v. *Moller*, 11 F. (2d) 55, and *The Whittemore, supra*, re-affirming its adherence to those cases in *The Thurlow* and again in *The Lake Galewood*, it has abruptly departed from the principles laid down therein and has embraced a novel *per curiam* method of limiting or else altogether avoiding the allowance of the statutory wages provided by U. S. C. title 46, Section 596, without assigning any cogent reason or citation of applicable authority.

The Lake Galewood, supra, where the Court of Appeals merely referred to its own previous opinions, which were in embarrassing conflict with the court's decision;

Collie v. *Fergusson* (C. C. A. 4), 31 F. (2d) 1010, (R., 75), the instant case, where no reason is assigned

nor any authority whatever relied on for the failure to allow any "waiting time".

Vir. R. Co. v. *U. S.*, 272 U. S. 658, where this Court criticized similar action on the part of a three judge statutory court sitting in the same Circuit and presided over by one of the instant Circuit Judges.

B. & O. R. R. Co. v. *U. S.*, 73 L. Ed. (Adv. Op.) 561, 563, where the Court re-iterated that:

> "The judges should have given the reasons on which they rested their decisions."

Petitioners submit that, by the decision complained of, the lower Court has in effect placed an interpretation and construction upon U. S. C. title 46, Section 596, contrary to and in the teeth of the clear and unambiguous language in which the statute was drafted by Congress and the Court reached its decision only by failing and refusing to give the language of this section its ordinary meaning. The statute being clear and unambiguous, within the constitutional authority of Congress, and to enforce and apply it exactly as it reads, not leading to absurd or impractical results, according to the decisions of this Court, there was no room or necessity in this case for construction or interpretation, the sole function of the courts being to enforce the statute according to its terms, and, as succintly phrased by Mr. Justice Holmes in *The Northern Star*, 271 U. S. 552, 556:

> "there is nothing for the courts to do but bow their heads and obey." (Italics added.)

Caminetti v. *U. S.*, 242 U. S. 470, 485, 490.

Sandberg v. *McDonald,* 248 U. S. 185, 202.
U. S. v. *Standard Brewery,* 251 U. S. 210, 217.
Dewey v. *U. S.,* 178 U. S. 510, 521.
Yazo & M. V. Co. v. *Jackson,* 226 U. S. 217.

Surely the situation found to exist in the present case aptly demonstrates the soundness of the rule laid down in *Elman* v. *Moller, supra,* where Circuit Judge Rose said:

> "The Courts should act promptly and vigorously to vindicate all the rights of seamen as well those recently conferred on them as those which date from time immemorial. We doubt not that even now they will often need all the protection which can be given them."

VI. CONCLUSION.

It is respectfully submitted that the petition for a writ of *certiorari* should be granted.

JACOB L. MOREWITZ,
Proctor for Petitioners.

PERCY CARMEL,
Of Counsel.